(2)

NO. 89-1573

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF ALABAMA,

PETITIONER

V.

WALTER RAYBON MCDANIEL,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA
AND
THE COURT OF CRIMINAL APPEALS OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION

JEFFERY C. DUFFEY
ATTORNEY FOR RESPONDENT
600 S. MCDONOUGH STREET
MONTGOMERY, AL 36104
205/834-4100

QUESTIONS PRESENTED

1. In a situation where an officer receives information from a confidential informant that several pounds of marijuana is contained in a vehicle, subsequently stops the vehicle one hour later, conducts a pat down search of the driver for weapons and feels in the driver's pocket a small closed opaque container that the officer knows was not a weapon, which is then seized and opened to reveal pills, and then places the driver under arrest for possession of controlled substances (pills), searches the vehicle and discovers that the vehicle contains no marijuana, the arrest, search, and seizure of the person is in violation of the Fourth and Fourteenth Amendments of the United

States Constitution.

2. This Court should not exercise its supervisory jurisdiction over the application of the Federal Constitution in this case where the facts were in dispute, it is not an issue of great public interest, nor is a novel or important principle at issue.

PARTIES

1. The caption in this case contains the names of all parties.

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OPINION BELOW

The opinion, issued by the Court of Criminal Appeals of Alabama on September 29, 1989, reversing Respondent's conviction because of illegally seized evidence is reported as: McDaniel v. State, 555 So.2d 1145 (Ala.Crim.App.

1989), cert. den., 1990 Ala. LEXIS 67 (Jan. 26, 1990). A copy of the same is submitted as Appendix "A" to this petition.

The Alabama Courts have declined to issue a stay in this cause.

The opinion issued by the Alabama Court of Criminal Appeals contains the following factual errors: (1.) The date of the incident is listed as December 13, 1989. 555 So.2d at 1146. (page 22 of this response). The correct date is December 13, 1986. (R-9). (2.) The opinion states that the defendant was stopped approximately 45 minutes after the deputy received the call from the confidential informant. 555 So.2d at 1146. (page 23 of this response). The testimony on a number of occasions was that the time elapsed was one hour and was stated at one time to be a minimum of

fifty minutes. (R-23, 29; Sup. R-15, 54). (3.) The opinion states that as the officers approached the defendant's truck "they saw a rifle through the back window of the truck." 555 So.2d at 1146. (page 23 of this response). The rifle was actually behind the seat in a zipped-up, opaque bag and not visible without looking behind the seat. (R-32, 33, 77, 120). (4.) The opinion states that Mrs. Graves had reported a burglary "several months earlier" to Deputy Watson. 555 So.2d at 1147. (page 26 of this response). Actually Mrs. Graves had reported the burglary more than a year prior to this offense. (R-47).

JURISDICTION

The Petitioner's Statement of Jurisdiction is correct, except that the correct citation for the statute is 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Respondent relies on the same constitutional provisions cited by the Petitioner which are:

AMENDMENT IV

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV
Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within this jurisdiction the equal protection of laws."

STATUTORY PROVISIONS INVOLVED

The statement by Petitioner as to statutory provisions is correct.

STATEMENT OF THE CASE

PROCEDURAL BACKGROUND

On December 13, 1986, Respondent was arrested after a warrantless search and seizure for possession of a controlled substance, i.e., Diazepam. (R9) (Sup.R-14, 27, 28). Respondent was subsequently indicted by the February 1987 term of the Houston County, Alabama Grand Jury for possession of Diazepam. (R158). On March 12, 1987, Respondent filed a Motion to Suppress based on an illegal arrest, search, and seizure. (R164).

On March 21, 1988, Respondent's Motion to Suppress was denied and he was convicted of the crime charged. On April 15, 1988, Respondent was sentenced to 30

years imprisonment and a fine of $50,000.00. (R-154).

On September 29, 1989, the Alabama Court of Criminal Appeals reversed the conviction of Respondent stating that the evidence was seized as a result of an unlawful seizure in violation of the United States Constitution. On November 17, 1989, the Alabama Court of Criminal Appeals denied without comment the Petitioner's Application for Rehearing. On January 26, 1990, the Alabama Supreme Court denied the Petition for Writ of Certiorari without comment. 555 So.2d 1145.

Respondent had been incarcerated in the Alabama Prison System since March 21, 1988. The Petitioner applied to the Alabama Court of Criminal Appeals and the Alabama Supreme Court for a stay of its opinion pending a Petition for Writ of

Certiorari being filed in the United States Supreme Court. Both courts denied the stay and Respondent has now been released on bond pending the outcome of this Petition.

FACTUAL BACKGROUND

Although the Petitioner states the evidence was without conflict, Respondent represents that the evidence was in great conflict. Because the evidence was in conflict and because of errors claimed in the opinion of the Court of Criminal Appeals, Respondent makes the following statement of facts.

On December 13, 1986, Deputy Joe Watson received a telephone call from a confidential informant. This informant had given Watson information in the past over a period of approximately four to five years on approximately seven cases, some of which led to arrests and some of

which led to convictions. (R-17, 40). The confidential informant told Watson that ten minutes prior to this telephone call, he had seen numerous pounds of marijuana in a vehicle, a truck. He described the vehicle, but stated he did not know where the vehicle was at the time. Deputy Watson told the informant to find out where the truck was and call him back. Watson didn't recall if this informant stated whether anybody was with the person in the vehicle. (Sup.R-16, 17, 19). There was no description given of the Respondent. There was no statement that Respondent was coming to a certain used car lot in Dothan, Alabama. Deputy Watson stated he had information that the Respondent had a weapon but not specifically what kind of weapon. (R-14).

About 30 minutes after Watson

received the call from the informant, Mrs. Charmane Graves called Deputy Watson. Mrs. Graves had provided information to him about a burglary one to two years previous. (R-47). At one hearing, Deputy Watson testified that he could not remember if Mrs. Graves gave him a description of the truck. (Sup.R-23). Deputy Watson testified on a different date that she did describe the truck and stated marijuana was in the truck, provided the tag number for the truck, and where the truck was going to be. (R-27).

Deputy Watson testified he thought Mrs. Graves was crazy and that she was hysterical. (Sup.R-22, 23; R-23). The information from Mrs. Graves was that her daughter and Respondent's nephew were in the vehicle and that Mrs. Graves had had a fight with Respondent. (R-38, 39).

Deputy Watson testified on May 15, 1987, that the first confidential informant was supposed to call him back and tell him the location of Respondent, and that the confidential informant did not call Deputy Watson back until after Deputy Watson had already stopped, arrested, and taken Respondent to jail. (Sup.R-12, 19, 20, 50). Deputy Watson then testified on March 21, 1988, that the first confidential informant returned the call prior to Deputy Watson stopping the Respondent and while Deputy Watson was in his police vehicle. This call was on Deputy Watson's beeper, lasted approximately fifteen seconds and gave the location of the Respondent. (R-14, 15, 23-25, 39-40).

Approximately one hour after Deputy Watson received the first call or from when the confidential informant said he

first saw the pounds of marijuana, Respondent was stopped by Deputy Watson and another officer. (Sup.R-11, 54). Contrary to the assertion by Petitioner, everything was not as the informants had predicted. There was no marijuana in the car, not even a seed and there was no female in the car. (Sup.R-29; R-41).

When Deputy Watson stopped the Respondent, he advised the Respondent that he was suspected of having marijuana in the vehicle and that Deputy Watson was about to make a search of the vehicle. (R-12). Deputy Watson had to ask for identification and inquire of the two occupants of the vehicle as to which was Respondent. Watson had no prior personal contact with the Respondent. (R-69).

The Respondent was not under arrest at the time of the stop and Deputy Watson

proceeded to check or pat down Respondent for weapons. (R-31; Sup.R-14, 27, 28). Respondent was not under arrest at the time of the pat down. (R-31). Deputy Watson found the bottle of pills when he was checking the person of Respondent for weapons. (Sup.R-27, 28). Watson knew the bottle was not a weapon when he patted Respondent down. The bottle was in Respondent's pocket. (R-25, 37). Respondent had no gun, had made no threats to Watson and did not resist. (R-26). Watson could not see through the bottle and opened the bottle to discover seventeen pills. Although the pills contained no name and no recognizable numbers, Watson testified he identified the pills as being Valium. (R-34, 35, 233). Watson could not state beyond a shadow of a doubt what the pills were but he "knew" what the pills were. (R-36).

No field test was conducted. (R-37). Watson arrested Respondent after the pills were discovered. (Sup.R-14). Deputy Watson testified that he took a class in college in pharmacology and therefore knew what the pills were. He then testified that he checked the PDR in his office after the arrest and the pills were not listed in the PDR. He then took the pills to the Southeast Alabama Medical Center Pharmacy where the pills were identified as generic valium. (R-74).

Deputy Watson did not have a warrant nor did he personally observe any criminal activity prior to stopping Respondent. (R-10).

A rifle was in the Respondent's vehicle but was behind the seat in a closed, zippered bag that could not be seen through. The rifle could not be

viewed without opening the car doors if it was behind the seat. (R-32). In fact the other deputy had to ask the other occupant of the vehicle where the rifle was and found it behind the seat. (R-120, 123). Contrary to the statement by Petitioner, the other occupant of Respondent's vehicle was not trying to load the rifle at the time of the stop. There was an empty shell on the floorboard. There was a clip in the glove compartment. He was going to put the empty shell in the clip. (R-123).

Deputy Watson's search of the vehicle failed to reveal any marijuana, not even a seed. No one else was arrested. (Sup.R-29).

SUMMARY OF THE ARGUMENT

I.

Contrary to the assertion by Petitioner, the excluded evidence was not

seized pursuant to a lawful custodial arrest, but was done during a pat down for weapons search. Respondent was then placed under arrest after the pat down. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).

II.

This Court should not exercise its supervisory authority in this case because of the great conflict in the facts.

ARGUMENT

I.
REASON FOR NOT GRANTING THE WRIT: THERE IS NO CONFLICT WITH THE OPINIONS OF THIS HONORABLE COURT

Contrary to the assertions of the Petitioner, Deputy Watson intended to make or made an investigatory stop in this case. Watson stopped the

Respondent, informed him he was suspected of having marijuana in the vehicle and that Watson intended to make a search. Watson then, by his own admission, prior to making any arrest, patted down the Respondent for weapons. During the pat down, Watson discovered the closed pill bottle, opened it and subsequently arrested Respondent for the pills. No marijuana was found in the vehicle or on Respondent's person, not even a seed. There is nothing contrary to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) or Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).

The information in this case from the confidential informant was that several pounds of marijuana were in the truck. There was no information that any marijuana was on the person of the

Respondent or that he was in possession of pills. It is obvious that the Respondent could not have pounds of marijuana in a pill bottle on his person. The information also was that Respondent had a rifle. Respondent obviously did not have the rifle on his person.

Petitioner's assertion that Deputy Watson had probable cause to believe that Respondent was committing a felony, therefore authorizing a custodial arrest is an incorrect statement as applied to the facts of this case. If that were true, Deputy Watson would have immediately arrested Respondent upon the stop rather than telling him he was a suspect and then not arresting him until after a pat down for weapons was made. It cannot be suggested that based on the information from the confidential informants that Deputy Watson could have

made a lawful arrest of Respondent strictly on that information after stopping Respondent and not finding any contraband in the vehicle. But for the pills, there would have been no arrest. If this were true, every search based on probable cause or search warrant would result in arrest of parties present even though no contraband is found. In other words, there would never be a differentiation between probable cause to search and probable cause to arrest. In any event, it is uncontradicted that the officer did not make the arrest until after the pat down for weapons when the pills were seized. Therefore, the Petitioner cannot assert that Respondent was searched and a seizure occurred based on an arrest.

II.

REASONS WHY THIS COURT SHOULD NOT EXERCISE ITS SUPERVISORY AUTHORITY

The Alabama Court of Criminal Appeals has not misapplied the law in this case. That Court has followed the principles established by the Constitution and decisions of the United States Supreme Court.

This is a case involving contested factual issues and the decision of the court of last resort on these issues should stand. This is not an issue of great public interest or a novel or important principle handed down by the Alabama Appellate Courts.

The facts in this case are not as simple as Petitioner states and it is a close call on the facts.

Mrs. Graves had motive to mislead Deputy Watson because she was mad at Respondent for dating her daughter. She was acting "crazy" when she called Watson.

The Respondent has already served two years in prison on this charge. Respondent was not released to the same community as Mrs. Graves and does not even live in the same county that she does.

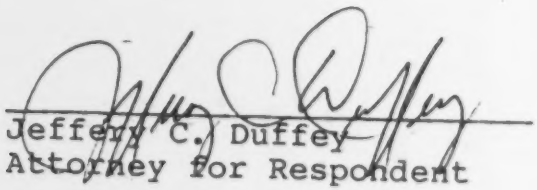
Based on the facts of this case, there is no unmistakable bad message being sent to law enforcement.

CONCLUSION

In conclusion, Respondent respectfully submits that the decisions of the Alabama Court of Criminal Appeals and of the Alabama Supreme Court are correct in this case. Therefore, Respondent requests that this Court deny

the Petition for Writ of Certiorari.

Respectfully submitted,



Jeffery C. Duffey
Attorney for Respondent

APPENDIX A

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1989

4 Div. 143

Walter Raybon McDaniel

v.

State

Appeal from Houstin Circuit Court

TAYLOR, PRESIDING JUDGE

The appellant, Walter Raybon McDaniel, was convicted of possession of drugs, a violation of [Section] 20-2-70, Code of Alabama 1975. He was sentenced to 30 years' imprisonment and was ordered to pay a $50,000 fine.

The state's evidence tended to show that on December 13, 1989, Deputy Watson received information from two informants, one of whom was a confidential informant,

that the appellant had several pounds of marijuana in his truck. The confidential informant told Watson that he had seen the marijuana in the appellant's truck. He also told Watson that the appellant would have a weapon in his possession. Another informant, Mrs. Graves, contacted Watson and verified the information provided by the confidential informant. She also said that her daughter and nephew would be with the appellant. Approximately 45 minutes after Watson's call from the confidential informant, two officers stopped the appellant without a warrant. As they approached the truck, they saw a rifle through the back window of the truck. They patted him down and searched the truck. No marijuana was discovered in the truck. However, during the search of appellant's person, Diazepam pills were found in a brown

glass bottle in the appellant's pocket. Diazepam, a common tranquilizer, is a controlled substance. Mrs. Graves' daughter stated that the pills belonged to her. On appeal, appellant challenges the legality of the search.

I.

Initially appellant contends that the officer conducted an illegal search and, thus, that evidence of the pills discovered pursuant to that search was the fruit of an unlawful search and seizure and was due to be suppressed.

According to well established legal principles, searches conducted with no warrant are per se "unreasonable," unless they fall under one of the exceptions to the warrant requirement. See Brannan v. State, [Ms. 1 Div. 509, February 24, 1989] ___ So.2d ___ (Ala.Cr.App. 1989).

The exceptions are:

> "(1) in plain view; (2) with consent voluntarily, intelligently and knowingly given; (3) as incident to lawful arrest; (4) in 'hot pursuit' or emergency situation; (5) where exigent circumstances exist coincidentally with probable cause; and (6) in 'stop and frisk' situations."

Smith v. State, 472 So.2d 677, 682 (Ala.Cr.App. 1984).

As Judge McMillan stated in Kinard v. State, 495 So.2d 705 (Ala.Cr.App. 1986):

> "Probable cause exists when the reasonably reliable information known to the officers is sufficient to cause the officers to entertain a strong suspicion that the object of the search is in the particular place to be searched."

495 So.2d at 709.

Probable cause based on information from an informant should meet the test of reliability. See Waters v. State, 360 So.2d 347 (Ala.Cr.App), writ denied, 360

So.2d 358 (Ala. 1978). Two relevant considerations in the determination of the reliability of an informant are basis of knowledge and credibility of the informant. See Stanfield v. State, 529 So.2d 1053 (Ala.Cr.App. 1988). In the instant case, Deputy Watson testified that the confidential informant had proven reliable over the past 7 years. He named several cases which the informant had "made" for him. The informant had also stated that he had observed the marijuana personally. The state proved this informant's reliability.

As mentioned above, in addition to that informant's information, a Mrs. Graves had also called the police. Deputy Watson stated that he was familiar with Mrs. Graves because she had reported a burglary several months earler, which

led to the arrest of an individual. "The veracity of the 'citizen informant' is easily established for 'the police should be permitted to assume that they are dealing with a credible person in the absence of special circumstances suggesting that such might not be the case.'" Crawley v. State, 440 So.2d 1148, 1149 (Ala.Cr.App. 1983).

We conclude that there was sufficient probable cause in this case to search the truck.

With regard to the body search of the appellant, we note that Deputy Watson testified that he had had information from the confidential informant that the appellant would have a weapon in his possession.

> "Terry [v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)] authorized a limited protection search for concealed weapons (a frisk) '[w]hen an

> officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others.' 392 U.S. at 24. 'So long as the officer is entitled to make a forcible stop, and has reason to believe that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose.' Adams [v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972)]...at 146. Section 15-5-31, Code of Alabama 1975, authorizes a search for weapons if the officer 'reasonably suspects that he is in danger of life or limb' when he has properly stopped a person for questioning."

Crawley, 440 So.2d at 1150.

In this case, the officer "patted down" the appellant because he had a reasonable suspicion that the appellant was armed, based upon the informant's statement. See, Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). However, as stated above, this type of search must be very limited in

scope. It is abundantly clear in this case that this was not a Terry stop and patdown. In this case, the police officer testified that he had searched the appellant for marijuana. Deputy Watson further testified that he knew when he touched the pill bottle it was not a weapon. Deputy Watson was not justified, under Terry, in performing such an intrusive search. The officer's concern was to discover marijuana. Seizure of the pill bottle was not lawful. There was no warrant. There were no exigent circumstances excusing obtaining a warrant. The officer did not seize the bottle in an attempt to protect himself. As a result of the unlawful seizure, evidence of the pills was received into evidence in violation of the United States Constitution. We have no choice, therefore, but to reverse and

remand this case for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

ALL THE JUDGES CONCUR.

CERTIFICATE OF SERVICE

I, Jeffery C. Duffey, a member of the Bar of the Supreme Court of the United States and attorney for Respondent, hereby certify that on this 28TH day of JUNE, 1990, I placed the foregoing response in the United States Mail, First Class, Postage Prepaid, to Honorable Joseph F. Spaniol, Jr., Clerk, United States Supreme Court, 1 First Street, N.E., Washington, D.C. 20543, and I served the correct number of copies of the foregoing response to Petition for Writ of Certiorari on Honorable Joseph G.L. Marston, III, Assistant Attorney General of Alabama, at the Alabama Statehouse, 11 S. Union Street, Montgomery, AL 36130, by First Class Postage Prepaid.

Attorney for Respondent